

## **EXHIBIT E**

ORIGINAL

004/015  
FILED  
CIVIL BUSINESS OFFICE 17  
CENTRAL DIVISION

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CLERK-SUPERIOR COURT  
SAN DIEGO COUNTY, CA

5 Case 3:07-cv-00706-BTM-POR Document 6 Filed 04/23/2007 Page 2 of 14  
 6 Attorneys for Plaintiff  
 Diane Swarberg.

## 7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

## 8 IN AND FOR THE COUNTY OF SAN DIEGO

9  
 10 DIANE SWARBERG, individually and on  
 behalf of all others similarly situated

No. 37-2007-00064066-CU-MT-CTL

11 Plaintiff,

12  
 13 vs.  
 14  
 15 MENU FOODS HOLDING, INC., THE  
 IAMS COMPANY, and DOES 1 through 100,  
 inclusive  
 16 Defendants

CLASS ACTION COMPLAINT  
 FOR BREACH OF WARRANTY;  
 VIOLATION OF THE CONSUMER  
 LEGAL REMEDIES ACT CIVIL CODE §  
 1750 ET SEQ.; NEGLIGENT  
 MISREPRESENTATION; STRICT  
 PRODUCTS LIABILITY; AND  
 NEGLIGENCE

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BY FAX

Plaintiff Diane Swarberg ("Plaintiff" or "Ms. Swarberg") brings this civil action for damages on behalf of herself and all other similarly situated against the above-named Defendants and complains and alleges as follows:

## J. NATURE OF ACTION

1. Ms. Swarberg brings this action as a Class Action pursuant to Rule 382 of the Code of Civil Procedure, on behalf of all persons residing in the State of California who purchased any dog or cat food which was produced by any of the above-named defendants and has had a dog or cat become ill or died as a result of eating the food, and/or which have had to incur veterinary bills purchase special kidney sensitive food, both present and in the future, as a result of such injuries.

2 The defendants are producers and distributors of, *inter alia*, dog and cat food.

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-1-

1 Menu Foods Holdings, Inc. produces dog and cat food under familiar brand names such as Iams,  
2 Eukanuba and Science Diet. Menu Foods Holdings, Inc. distributes its dog and cat food  
3 throughout the United States to retailers such as Wal-Mart, Target, Petco, PetSmart, and Safeway.

4 3. Dog and cat food which the defendants produced has caused an unknown number  
5 of dogs and cats to become ill, and caused several to die.

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6 4. To date, Menu Foods Holdings, Inc. has recalled 53 brands of dog food and 42  
7 brands of cat food which are causing dogs and cats to become ill. All recalled food to date is of  
8 the "cuts and gravy wet" style. The recalled brands, including any to be added to the recall list  
9 later, are collectively referred to herein as the "Product."

10 5. As a result of the Defendants' actions Ms. Swarberg and other Class members have  
11 suffered and will suffer economic damage.

## 12 II. PARTIES

13 6. Plaintiff Diane Swarberg has at all material times been a resident of San Diego,  
14 California.

15 7. Defendant Menu Foods Holdings, Inc. is, upon information and belief, a  
16 corporation organized under the laws of Delaware which transacts business in each of the 50  
17 United States, including the State of California and County of San Diego. Menu Foods Holdings,  
18 Inc. and/or its subsidiaries, is engaged in the business of manufacturing, distributing, marketing  
19 and selling pet foods.

20 8. Defendant, The Iams Company, is upon information and belief, an Ohio company  
21 which transacts business in California and all 50 States, including the State of California and  
22 County of San Diego. IAMS is engaged in the business of manufacturing, distributing, marketing  
23 and selling pet foods.

24 9. Plaintiff is ignorant at this time of the true names and capacities of Defendants  
25 identified in the caption of this Complaint as DOE 1 through DOE 25. Plaintiff is suing these  
26 Defendants by such fictitious names pursuant to California Code of Civil Procedure section 474  
27 and will amend this Complaint to show their true names and capacities when the same have been  
28 ascertained. For the time being, Plaintiff is informed and believes that Defendants DOES 1

1 though 25 were and are business entities, organizations, joint venturers, partnerships, associations,  
2 public entities, public agencies, and/or individuals who participated in the design, engineering,  
3 development, manufacture, marketing, and selling of the Product along with the other named  
4 Defendants.

5 10. Plaintiff is further informed and believe that at all times mentioned in this  
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6 Complaint, Defendants, including DOES 1 through 25, were the agent, servant, and/or employee  
7 of the other, and each was acting within the course and scope of their agency and/or employment  
8 with respect to the acts complained of in this Complaint.

9

10 **III. JURISDICTION AND VENUE**

11 11. This Court has jurisdiction over this action pursuant to California Code of  
Procedure section 410.10. Plaintiff seeks damages and restitution on behalf of herself and all  
13 others similarly situated in the United States, under common and statutory law of the State of  
14 California.

15 12. Venue is proper in this Court because (a) the warranties which are the subject of  
16 this action were made, or to be performed, and/or breached in this county; (b) the obligation or  
17 liability which is the subject of this action arose in this county; (c) some of the described injuries  
18 to property occurred in this county; (d) a substantial portion of the acts and transactions described  
19 herein occurred within this county; (f) Defendants are registered to do business in the State of  
20 California and/or are doing business within this county; and (g) because Defendants did do  
21 business in this county by selling and marketing the items at issue in this county. Attached to this  
22 Complaint as Exhibit "A" is a declaration from Plaintiff Swarberg attesting to facts establishing  
23 proper venue in this county pursuant to Civil Code section 1780(c).

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#### IV. CLASS ACTION ALLEGATIONS

3       13. Plaintiff brings this lawsuit as a class action on behalf of herself and all other  
4 persons similarly situated, pursuant to *Code of Civil Procedure* section 382, and to the extent  
5 applicable, the analogous provisions of *Federal Rule of Civil Procedure* 23. And, as detailed  
6 below, this class action satisfies the numerosity, ascertainability, typicality, adequacy,  
7 predominance, and superiority requirements of those statutes. Plaintiff brings this suit on behalf  
8 of herself and a Plaintiff Class (the "Class") composed of:

9               All persons residing in the State of California at the time that they purchased any  
10 dog or cat food which was produced by the defendants which became the subject of the  
11 recall of such food, and who have had a dog or cat which became ill resulting in death or  
12 injury, and/or required veterinary examinations, and/or will require increased veterinary  
13 examinations as a result of eating the food.

14       Plaintiff reserves the right to modify this class definition prior to moving for class  
15 certification.

16       14. This action has been brought and may be properly maintained as a class action  
17 pursuant to C.C. P. 382, Civil Code section 1781, and Rule 23 of the Federal Rules of Civil  
18 Procedure for the following reasons:

19               a. The Class is ascertainable and there is a well-defined community of interest  
20 among the members of the Class;

21               b. Membership in the Class is so numerous as to make it impractical to bring  
22 all Class members before the Court. The identity and exact number of Class members is unknown  
23 but is estimated to be at least in the hundreds, if not thousands considering the fact that Menu  
24 Foods Holdings, Inc. has identified 53 dog foods and 42 cat foods which may be causing harm to  
25 pets, and there are news reports of many ill or dying pets;

26               c. Plaintiff's claims are typical of those of other Class members, all of whom  
27 have suffered harm due to Defendants' uniform course of conduct;

28               d. Plaintiff is a member of the Class;

4 i. Did the defendants make representations regarding the safety of the  
5 dog and cat food they produced and sold?

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6 ii. Were the defendants' representations regarding the safety of the dog  
7 and cat food they produced and sold?

10 iv. Were Plaintiff and other Class members damaged?

11 f. These and other questions of law or fact which are common to the members  
12 of the Class predominate over any questions affecting only individual members of the Class;

13 g. Plaintiff will fairly and adequately protect the interest of the Class in that  
14 Plaintiff has no interests that are antagonistic to other members of the Class and has retained  
15 counsel competent in the prosecution of class actions to represent herself and the Class:

16 h. Without a class action, the Class will continue to suffer damage,  
17 Defendants' violations of the law or laws will continue without remedy, and Defendants will  
18 continue to enjoy the fruits and proceeds of their unlawful misconduct;

19                   I.       Given (i) the substantive complexity of this litigation; (ii) the size of  
20 individual Class members' claims; and (iii) the limited resources of the Class members, few, if  
21 any, Class members could afford to seek legal redress individually for the wrongs Defendants  
22 have committed against them;

25 k. Inferences and presumptions of materiality and reliance are available to  
26 obtain class-wide determinations of those elements within the Class claims, as are accepted  
27 methodologies for class-wide proof of damages; alternatively, upon adjudication of Defendants'  
28 common liability, the Court can efficiently determine the claims of the individual Class members:

1                   I.     This action presents no difficulty that would impede the Court's  
2 management of it as a class action, and a class action is the best (if not the only) available means  
3 by which members of the Class can seek legal redress for the harm caused them by Defendants.

4 m. In the absence of a class action, Defendants would be unjustly enriched  
5 because they would be able to retain the benefits and fruits of their wrongful conduct. *Case 3:07-cv-00216-PTW-POR Document 6 Filed 04/13/2007 Page*

15. The Claims in this case are also properly certifiable under applicable law.

## V. STATEMENT OF FACTS

9 16 Plaintiff Diane Swarberg was the owner of a male cat named Oscar.

10 17. Ms. Swarberg acquired Oscar in 1995.

11 18 Oscar ate one to three bags daily of IAMS Select Adult Bites, which is one of the  
12 foods covered by Defendants' recall. He has been eating IAMS Select Adult Bites for many years.  
13 He had been generally healthy up until March 2007.

14. 19 In March 2007, Oscar became extremely ill and Ms. Swarberg took him to a  
15. veterinarian who informed her that Oscar had suffered kidney failure, also known as acute renal  
16. failure. A few days later, on March 15, 2007, tests showed that Oscar was suffering from  
17. irreversible kidney failure, and the advice of the veterinarian was that the humane thing to do was  
18. to euthanize Oscar, which was done with great reluctance. Blood and urine tests were done, and  
19. an autopsy has confirmed that the kidney failure was consistent with poisoning. On information  
20. and belief, at least six other cats in San Diego County have died due to poisoning by Defendants'  
21. Product.

22        20. In March 2007, Menu Foods Holdings, Inc. recalled 53 brands of cuts and gravy  
23 wet-style dog food and 42 brands of cuts and gravy wet style cat food which had caused dogs and  
24 pets to become ill. One common symptom in the sick animals was kidney failure, also known as  
25 acute renal failure. On information and belief, the recalled foods are contaminated with a  
26 rodenticide which is a known poison harmful to cats and dogs.

27 21. On information and belief, the contaminated Product has caused the deaths or  
28 sickness of hundreds of cats and dogs nationwide, requiring veterinary care, repeated monitoring

1 by veterinarians, special medication, and permanent injuries. Those class members who have had  
2 their pets die, have lost the fair market and other peculiar value (Civil Code § 3355) of their pets.  
3 The peculiar value of the pets to their owners, is deemed to be the value of that property because  
4 Defendants had notice thereof and/or were willful wrongdoers pursuant to Civil Code section  
5 3355. The class members have had to throw out substantial quantities of unused pet food due to  
6 the recall. The owners of such injured pets, such as Ms. Swarberg, have also suffered severe  
7 emotional distress at having their pets die and /or become hospitalized as a result of ingesting the  
8 Product. Those emotional distress claims will be subject to individualized proof, post-disposition  
9 of common class claims, as shall be further articulated in a trial plan.

10 **FIRST CAUSE OF ACTION**

11 **BREACH OF WARRANTY**

12 22. Plaintiff realleges all prior allegations as though fully stated herein.

13 23. Plaintiff and Class members purchased pet food produced by the defendants based  
14 on the understanding that the food was safe for their pets to consume.

15 24. The pet food produced by the defendants was not safe for pets to consume and  
16 caused dogs and cats to become ill. The unsafe nature of the pet food constituted a breach of the  
17 implied warranty of merchantability.

18 25. Cat food and dog food produced by Menu Foods Holdings, Inc. are "goods" within  
19 the meaning of Uniform Commercial Code Article 2.

20 26. Defendants' conduct as described herein constitutes breach of an implied or express  
21 warranty of affirmation.

22 27. Defendants' conduct as described herein constitutes breach of an implied warranty  
23 of merchantability.

24 28. Defendants' conduct as described herein constitutes breach of an implied warranty  
25 of fitness for a particular purpose.

26 29. As a proximate result of the aforementioned wrongful conduct and breach, Ms.  
27 Swarberg and other class members have suffered damages in an amount to be proven at trial.  
28 Defendants had actual or constructive notice of such damages.

1       30.     As a result of the breach, Plaintiff and Class members suffered damages which may  
2     fairly and reasonably be considered as arising naturally from the breach or may reasonably be  
3     supposed to have been in the contemplation of the parties, at the time they made warranties as to  
4     the Product, and as the probable result of the breach of such warranties.

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**SECOND CAUSE OF ACTION**

## UNJUST ENRICHMENT

8 31. Plaintiff realleges all prior allegations as thought fully stated herein.

9       32. Defendants were and continue to be unjustly enriched at the expense of Ms.  
10      Swarberg and other Class members.

11 33. Defendants should be required to disgorge this unjust enrichment.

### THIRD CAUSE OF ACTION

## **CONSUMER LEGAL REMEDIES ACT**

(Civil Code section 1750, et. seq.)

15 34. Plaintiff realleges all prior allegations as thought fully stated herein.

16       35. Defendants' sale of tainted pet food constitutes an unlawful, deceptive and unfair  
17 business act within the meaning of the Consumer Legal Remedies Act, Civil Code section 1750.  
18 et. seq.

19 36. Defendants are "persons" as defined under Civil Code section 1761(c).

20       37. Defendants violated Civil Code sections 1770(a)(5) and (7) when they failed to  
21 disclose that Defendants' Product is inherently defective and dangerous and not fit for its intended  
22 purpose. Defendants' sale of hazardous pet food has the capacity to deceive a substantial portion  
23 of the public and to affect the public interest.

24 38. As a result of the above material omissions, Defendants have committed the  
25 following violations of section 1770:

- a) Defendants have represented that their pet food has characteristics or benefits which it does not have (section 1770(a) (5));
- b) Defendants have falsely represented that their pet food is of a particular standard, quality or grade (section 1770(a) (7)).

1           39. Defendants' deceptive practices, as alleged above, were specifically designed to,  
2 and did, induce Plaintiffs and members of the Class to purchase the Product. Defendants  
3 engaged in marketing efforts to reach the Class and persuade members to purchase the  
4 defective Product, leading to the injuries to their pets as well as other damages.  
5

6           40. [Case 3:07-cv-00706-BTM-POR Document 6 Filed 04/23/2007 Page 10 of 1](#)  
7           As a result of Defendants' unfair or deceptive acts or practices, Ms. Swarberg and  
8 other class members suffered injuries in an amount to be proven at trial.  
9

10           41. Plaintiff and the Class are providing Defendants with the notice required by giving notice of their violation of the Consumers Legal Remedies Act by mail. Plaintiffs at this  
11 time request only injunctive relief, until the expiration of the 30 day period in which Defendants  
12 may respond to the notice. Such injunctive relief may include further notice of the recall to the  
13 public, and an expansion of the recall, among other things. Plaintiff and the Class will amend  
14 their Complaint to add claims for damages in the event that Defendants do not respond to the  
15 Notice in the specified time. As such, Plaintiffs have therefore complied with the 30-day notice  
16 period required by Civil Code section 1782(a).  
17

#### 18           FOURTH CAUSE OF ACTION

#### 19           NEGLIGENT MISREPRESENTATION

20           41. Plaintiff realleges all prior allegations as though fully stated herein.  
21           42. Defendants owed Ms. Swarberg and the Class members as a duty to exercise reasonable care in representing the safety of its dog and cat foods.  
22

23           43. Defendants falsely represented that its dog and cat food was safe for consumption by dogs and cats.  
24

25           44. In reality, Defendants' dog and cat food caused dogs and cats to become ill and, in some cases, to die.  
26

27           45. Ms. Swarberg and class members reasonably relied on the information provided by Defendants regarding the safety of its dog and cat food.  
28

29           46. As a proximate cause of Defendants' false representations Ms. Swarberg and other Class members suffered damages in an amount to be proven at trial.  
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## 2 FIFTH CAUSE OF ACTION

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## STRICT PRODUCTS LIABILITY

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47. Plaintiff realleges all prior allegations as though fully stated herein.

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48. The Product in all its forms is defective in that it was manufactured or packaged  
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such that it came to contain poisons that are harmful to animals which consume it. Defendants,  
and each of them, knew that the Product would be purchased and used without inspection for  
defects by the purchaser or user. The Product was further defective due to inadequate testing.

9

49. The kinds of harm which befell Plaintiff, her pet, and the members of the Class and  
their pets, including in the form of veterinary expenses and emotional distress, were entirely  
foreseeable results of the defect in the Product.

12

50. Neither Plaintiff nor any member of the Class knew or had reason to know at the  
time of his/her purchase, or at any time prior to the injuries to their pets, that the Product was  
defective.

15

51. Plaintiff requests damages including punitive damages, and medical and related  
expenses for their pets, against all Defendants.

17

## SIXTH CAUSE OF ACTION

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## NEGLIGENCE

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52. Plaintiff realleges all prior allegations as though fully stated herein.

20

53. Because Defendants were in the business of manufacturing, canning, marketing,  
distributing and selling food for consumption by pets and possibly by members of the general  
public who might intentionally or unknowingly consume it, Defendants each owed a duty of care  
to the general public and to Plaintiff and the Class members in particular, to use reasonable care to  
see that the Product sold by them was fit for animal as well as human consumption.

25

54. Defendants, and each of them, failed to use reasonable care in the manufacture,  
processing, preparation, and sale of the Product as described above, and as a proximate result of  
their negligence and carelessness, poison in the form of rodenticide or other contaminants harmful  
to animals and humans was present in the Product purchased by the Class members and consumed

1 by their pets.

2 **VII. PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiff and the Class members request that the Court enter an order of  
4 judgment against Defendants including the following:

5 A. Certification of the action as a class action pursuant to C.C.P. Rule 382 and Civil  
6 Case 3:07-cv-00706-BTM-POR Document 6 Filed 04/23/2007 Page 12 of 1  
Code section 1781 with respect to the claims for damages, and appointment of Plaintiff as Class  
7 Representative and her counsel of record as Class Counsel;

8 B. Actual damages (including all general, special, incidental, and consequential  
9 damages), statutory damages (including treble damages), punitive damages (as allowed by the  
10 law(s) of the states having a legally sufficient connection with defendants and their acts or  
11 omissions) and such other relief as provided by the statutes cited herein;

12 C. Prejudgment and post-judgment interest on such monetary relief;

13 D. Equitable relief in the form of restitution and/or disgorgement of all unlawful or  
14 illegal profits received by Defendants as a result of the unfair, unlawful and/or deceptive conduct  
15 alleged herein;

16 E. Other appropriate injunctive relief including but not limited to additional notice of  
the recall to the public;

17 F. The costs of bringing this suit, including reasonable attorneys' fees; and

18 G. Such other relief as this Court may deem just, equitable and proper.

21 Date: March 26, 2007

BERDING & WEIL LLP

22  
23 By \_\_\_\_\_  
24 \_\_\_\_\_  
Jeffrey B. Cirigliano, Esq.  
Steven R. Weinmann, Esq.  
25 Attorneys for Plaintiff  
26  
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28

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FILED 01/19/01  
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27 MAR 26 PM '42

CLERK'S OFFICE, COURT  
SAN DIEGO COUNTY, CA

6 Attorneys for Plaintiff  
Case 5:07-cv-00706-BTM-POR Document 6 Filed 04/23/2007 Page 13 of 13  
Diane Swarberg

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

10 DIANE SWARBERG, individually and on behalf of all others similarly situated.

No. 37-2007-00064066-CU-MT-CTL

**Plaintiff**

**DECLARATION IN LIEU OF  
AFFIDAVIT**

13  
14 MENU FOODS HOLDING, INC., THE  
15 IAMS COMPANY, and DOES 1 through 100,  
inclusive.

**(Code of Civil Procedure § 2015.5)**

### Defendants

**DECLARATION OF PLAINTIFF DIANE  
SWARNERG PURSUANT TO CIVIL  
CODE SECTION 1780(c)**

BY FAX

I, DIANE SWARBERG, declare:

20       1. I am the named Plaintiff in the above-captioned lawsuit, and I submit this  
21 Declaration in support of Plaintiff's Complaint and in accordance with Civil Code section  
22 1780(c) to state facts showing that this action has been commenced in a county described in  
23 Code of Civil Procedure section 1780 as a proper place for the trial of this action.

24       2. I am a citizen and resident of San Diego County, State of California, and, if called  
25 as a witness, I would testify of my own personal knowledge as follows:

26       3.     In the period from 2005 to March 2007, I purchased cat food sold under the  
27 brand name "IAMS Select Adult Bites" for my cat, Oscar, at a store in San Diego County,  
28 California.

**DECLARATION IN LIEU OF AFFIDAVIT**

1           4. It is my understanding that the cat food I purchased was manufactured by Menu  
2 Foods, Inc. for IAMS, and that this particular item is part of a recall of contaminated pet food by  
3 Menu Foods, Inc.

4 S. My cat, Oscar, became ill after consuming the LAMS / Menu Foods food.

5 6. I brought him to a veterinarian, who told me that he was suffering from kidney  
6 failure. Case 3:07-cv-00706-BTM-POR Document 6 Filed 04/23/2007

7        7. Following further tests, it was decided that the most humane thing to do was to  
8 euthanize Oscar, who died on March 15, 2007.

9       8. An autopsy has been performed, and the tests show that Oscar had poison in his  
10 system. Recent press reports have stated that the Menu Foods products are contaminated with a  
11 type of rat poison.

12        9. All of the matters discussed herein occurred or substantially occurred in San  
13 Diego County, in the State of California.

14 I declare under penalty of perjury under the laws of the State of California that the  
15 foregoing is true and correct. Executed this 27 day of March, 2007, at San Diego,  
16 California.

Diane Swarberg  
Diane Swarberg

3

**DECLARATION IN LIEU OF AFFIDAVIT**